Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
Implementation of the Cable Television Consumer Protection and Competition Act of 1992	)	MM Docket No. 92-259
Broadcast Signal Carriage Issues	)	

COMMENTS OF DISCOVERY COMMUNICATIONS, INC.

Discovery Communication, Inc. ("Discovery Communications") hereby submits its comments in response to the Notice of Proposed Rule Making (the "Notice") in the above referenced proceeding. Discovery Communications owns The Learning Channel and operates The Discovery Channel. Both channels license their programming to cable operators.

A. Background

The Discovery Channel, founded in 1985, is now the fifth largest cable network. Its programming regularly provides serious commentary on issues of national and international significance. For example, installments of "Discovery Journal" have addressed issues such as capital punishment and world hunger. The Discovery Channel also features documentaries, including such prize-winning programs as "In the Company of Whales," "Red Sea," and "Russia: Live From The Inside."

The Learning Channel was acquired by Discovery Communications in 1991, and after substantial revamping, was

relaunched later that year. The Learning Channel features educational programming for viewers of all ages and education levels. For example, it includes six hours of commercial-free educational programs for preschoolers every weekday morning, programs for elementary and high school students, programs for adults who need to improve their reading skills, and programs for teachers.

The Discovery Channel is carried by most cable operators and has approximately 59 million subscribers. The Learning Channel is carried by approximately 15% of multichannel video programming distributors and approximately 17.5 million subscribers.

B. Must-Carry Regulations

1. The Act's Underlying Must-Carry Provisions Are Unconstitutional

The must-carry provisions of the Cable Television Consumer Protection and Competition Act of 1992 ("the Act") violate the First Amendment by targeting cable operators and programmers, both of whom have the same First Amendment rights as newspapers. See Leathers v. Medlock, 111 S. Ct. 1438, 1442 (1991). Those provisions compel cable operators to carry programs they would not otherwise carry and thus unconstitutionally deprive them of their editorial discretion and unconstitutionally force speech. See, Quincy Cable TV, Inc. v. Federal Communications Commission, 768 F.2d 1434 (D.C. Cir. 1985), cert. denied, 476 U.S. 1169 (1986); Miami Herald Publishing Co., v. Tornillo, 418 U.S. 241 (1974). As a result,

cable programmers such as The Discovery Channel and The Learning Channel will be displaced, thereby unconstitutionally limiting their audience. See City of Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750 (1988); Riley v. National Federation of the Blind of North Carolina, 487 U.S. 781 (1988).

In fact, a number of cable operators who were considering carrying The Learning Channel are no longer willing to do so because of the need to reserve space for local commercial and public broadcasters which must be carried pursuant to the Act. (See Declaration of Bill Goodwyn attached as Exhibit B.) A number of cable operators also have informed The Discovery Channel that they will move it from the basic program tier to make space available for broadcast stations that must be carried on the basic tier pursuant to the Act. (See Supplemental Declaration of Dawn McCall, attached as Exhibit C.)

On November 12, 1992, Discovery Communications filed a complaint in federal district court in Washington, D.C., asking, among other things, that the must-carry provisions of the Act be declared unconstitutional and that the Commission be enjoined from promulgating regulations pursuant to the unconstitutional provisions. A copy of that complaint is attached as Exhibit A.

Discovery Communications submits these comments without prejudice to any of its constitutional claims and without waiving its rights to any judicial relief it is seeking.

2. The Commission's Regulations Should Avoid Compounding First Amendment Intrusions on Cable Operators and Cable Programmers

The Commission's must-carry regulations cannot cure the Act's facial constitutional defects.[1/] No matter how the Commission defines a "local commercial station" or "television market," no matter how it requires cable operators to select its quota of local broadcast stations, and no matter how it determines conflicting claims by local broadcasters for premium channel designations are to be resolved, cable operators still will be unconstitutionally required to carry and give preference to local broadcast stations. Thus, this rulemaking cannot save the must-carry provisions from facial unconstitutionality.

Nevertheless, to the Commission's regulations should not compound the injury resulting from the unconstitutional must-carry requirement.[2/] Wherever possible the Commission should avoid adopting regulations that would expand must-carry

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1/ Nor can the Commission declare an Act of Congress unconstitutional. Johnson v. Robinson, 415 U.S. 361 (1974). As a leading treatise states, "We commit to administrative agencies the power to determine constitutional applicability, but we do not commit to administrative agencies the power to determine constitutionality of legislation. Only the courts have authority to take action which runs counter to the expressed will of the legislative body." Davis, Administrative Law, § 20.04.

2/ The possibility that the Commission is now considering regulations under the must-carry requirement does not interdict a challenge to the underlying provision which is facially unconstitutional before such regulations are adopted. Nixon v. Administrator of General Services Administration, 433 U.S. 425, 439 (1977).

obligations beyond the minimum possible scope allowed by the Act. For example, the Commission should act in a manner consistent with this objective as resolves the following definitions: (i) "qualified local NCE station" (Notice, ¶ 7), (ii) a cable operator's "principal headend" (¶¶ 8), (iii) "substantial duplication" (¶ 11, 25), (iv) "local commercial station" (¶ 17), (v) a broadcasting station's television "market" (¶ 18), (vi) "network affiliate" (¶ 26), (vii) "qualified low power television stations" (¶ 27, (viii) "predominantly utilized for the transmission of sales presentations or program length commercials" (¶ 31), and (ix) "multichannel video program programming distributor" (¶ 42).

3. The Commission's Regulations Should Not Apply The Act In A Retroactive Manner

The Act does not provide for retroactive application, and regulations adopted by the Commission should be prospective only. As a matter of statutory construction, retroactive application of a statute is disfavored. Alexander v. Robinson, 756, F.2d 1153, 1156 (5th Cir. 1985) ("Retroactive application of the laws is undesirable where advance notice of the change in the law would motivate a change in an individual's behavior or conduct."); Bitronics Sales Co. v. Microsemiconductor Corp., 610 F. Supp. 550, 555-557 (D. Minn. 1985). Thus, for example, the Commission's regulations should not have the effect of interfering with existing contracts with cable programmers. (For further discussion of the impropriety of abrogating existing contracts, see section 4, below.)

4. The Commission's Must-Carry Regulations Must Respect Existing Contracts Between Cable Systems and Programmers

Both The Discovery Channel and The Learning Channel have pre-existing contracts with cable operators governing all the terms and conditions under which their programming may be exhibited. These contracts are the result of good-faith negotiations and involve a multitude of bargained-for terms, including price, license period, and in some cases channel placement. Both cable programmers and operators have relied on these contracts.

The must-carry provisions of the Act are silent with respect to the abrogation of existing contracts between cable operators and programmers and the Act should not be construed to require abrogation. Abrogation of existing common law rights is disfavored, and statutes which threaten existing contractual rights must be strictly construed. Sutherland, Statutory Construction, §61.06 (5th ed. 1992). Thus, given the absence of any provision in the must-carry section of the Act expressly abrogating the terms of existing contracts between cable operators and cable programmers, the Commission's regulations should not require that a cable programmer be dropped to provide space for a cable operators nor that channel positions be changed, where to do so would violate an existing contract between a cable operator and a cable programmer.

In addition, basic fairness requires deference to existing contracts between cable programmers and cable systems. Just as the Commission has proposed in its regulations that existing

contracts between cable systems and broadcasters be protected even where the result might be to defer full implementation of the Act's provisions (Notice, ¶¶33 and 38), so should it adopt regulations that permit cable systems to continue to abide by their contracts with cable programmers.

5. The Commission's Regulations Should Treat Cable Programmers and Television Broadcasters Even-Handedly

In exercising its regulatory discretion and apart from the issue of honoring existing contracts, the Commission should wherever possible treat cable programmers and television broadcasters in an even-handed manner. For example, basic fairness requires that, if the Commission's regulations require cable operators to provide thirty days' notice to broadcasters and subscribers of deletion and/or channel repositioning, cable systems also should be required to provide such notice to cable programmers and their subscribers when cable programmers are deleted and/or repositioned.

C. Retransmission Consent

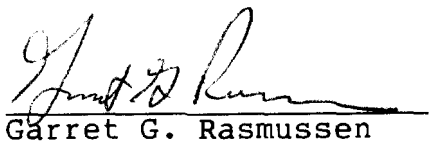
Although Discovery Communications has not challenged the constitutionality of retransmission consent standing alone, the retransmission consent provision is inextricably linked to the must-carry provisions, and thus should fall with the must-carry provisions as requested by a number of parties in the federal court litigation. The Commission's Notice highlights the linkage between the must-carry provisions and the retransmission-consent provisions of the Act, observing that "the implementation of the new Section 325 (b) and the new Section 614 must be addressed

jointly" (Notice, ¶48). Congress' obvious intent was that the must-carry provisions and the retransmission consent provisions work together, complementing each other. In such a situation, the Supreme Court has held that the linked provisions must fall with the unconstitutional provisions even when there is a severability clause in the act. Alaska Airlines, Inc. v. Brock, 480 U.S. 678, 685 (1987). Here, there is no suggestion that Congress would have enacted the retransmission-consent provision standing alone. To the contrary, Congress conditioned retransmission consent on giving up something of value -- the must-carry right. If Congress had meant to convey a general, risk-free retransmission right, it would have done so without linking it to the must-carry provisions.

The conflation of the must-carry provisions and the retransmission consent provision also compound the First Amendment injury to cable operators and programmers. Cable operators are not only forced to speak, they are forced to speak in a manner which is most harmful to them. Under the Act's scheme, only the less popular stations will opt for must carry rather than seeking compensation for the retransmission of their programming.

In order to avoid further exacerbating the injury resulting from the unconstitutional must-carry provisions, regulations adopted by the Commission pursuant to retransmission-consent provisions of the Act should be expressly conditioned on the constitutionality of the must-carry provisions.

Respectfully Submitted,



Garret G. Rasmussen
Patton, Boggs & Blow
2550 M Street, NW
Washington, D.C. 20037
(202) 457-6000

Of Counsel:

Judith A. McHale
Senior Vice President and General Counsel
Discovery Communications, Inc.

Barbara S. Wellbery
Vice President and Deputy General Counsel
Discovery Communications, Inc.
(301) 986-0444 Ext. 5219

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DISCOVERY COMMUNICATIONS, INC., and THE LEARNING CHANNEL, INC., Plaintiffs, v. UNITED STATES OF AMERICA, and FEDERAL COMMUNICATIONS COMMISSION Defendants.	Civil Action No. ___

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF APPLICATION FOR THREE-JUDGE COURT

Plaintiffs Discovery Communications, Inc. and The Learning Channel, Inc. submit this memorandum in support of plaintiffs' application that this case be heard by a Three-Judge Court convened under 28 U.S.C. § 2284 and that the Court hear all federal constitutional claims in the complaint under its pendent jurisdiction authority, in addition to the claims required to be heard by this Court under 28 U.S.C. § 2284.

In this action, plaintiffs challenge, under the First Amendment of the Constitution, the Cable Television Consumer Protection and Competition Enhancement Act of 1992 (the "1992 Cable Act"). In part, the complaint challenges Sections 4 and 5 of the 1992 Cable Act, amending Part II of Title VI of the

Communications Act of 1934, 47 U.S.C. § § 531 et seq, by adding two new sections: respectively, Sections 614 and 615 thereto (Counts III and IV). The 1992 Cable Act provides for judicial review of these provisions by a Three-Judge Court. Section 23, 1992 Cable Act (to be codified at 47 U.S.C. § 555(c)(1)).

The complaint also challenges, under the First Amendment, all speech regulations by the 1992 Cable Act, and specifically Sections 3, 6, 9 and 19 thereof (Counts I, II, V and VI). Since the Court has jurisdiction over Counts III and IV, the Court has pendent jurisdiction over all the counts of the complaint, all of which rest on the First Amendment.

Substantial Supreme Court authority holds that three-judge courts have broad discretion to exercise pendent jurisdiction over issues that, standing alone, would not have invoked the jurisdiction of the three-judge court. In Florida Lime and Avocado Growers, Inc. v. Jacobsen, 362 U.S. 73, 80 (1960), the Supreme Court said:

> Cases in this Court since Louisville & Nashville R. Co. v. Garrett, 231 U.S. 298 (1913), have consistently adhered to the view that, in an injunction action challenging a state statute on substantial federal constitutional grounds, a three-judge court is required to be convened and has--just as we have on a direct appeal from its action--jurisdiction over all claims raised against the statute. 7/

7/ See, e.g., Van Dyke v. Geary, 244 U.S. 39; Cavanaugh v. Looney, 248 U.S. 453; Lemke v. Homer Farmers Elevator Co., 258 U.S. 65 (Lemke II); Chicago, Great Western R. Co. v. Kendall, 266 U.S. 94; Shafer v. Farmers Grain Co. of Embden, 268 U.S. 189; Herkness v. Irion, 278 U.S. 92; Sterling v. Constantin, 287 U.S. 378; Spielman Motor

Sales Co. v. Dodge, 295 U.S. 89; Railroad Comm'n of State of California v. Pacific Gas & Electric Co., 302 U.S. 388; Public Service Comm'n v. Brashear Freight Lines, 312 U.S. 621; Parker v. Brown, 317 U.S. 341.

California Water Service Co. v. City of Redding, 304 U.S. 252, 255-56 (1938) (three-judge court's jurisdiction by virtue of substantial federal question would permit it to adjudicate local claim of invalidity under state law).

In White v. Regester, 412 U.S. 755 (1972), the Court held that the three-judge court was permitted to issue an injunction (which the jurisdictional statute authorized) and also a declaration of invalidity (which the jurisdictional statute did not authorize). The Court said: "With the Texas reapportionment plan before it, it was in the interest of judicial economy and the avoidance of piecemeal litigation that the three-judge District Court have jurisdiction over all claims raised against the statute when a substantial constitutional claim was alleged. . ." 412 U.S. at 761.

Plaintiffs' challenge to other speech regulations by the 1992 Cable Act (Counts I, II, V and VI) is inextricably intertwined with its claims regarding the must-carry provisions (Counts III and IV) and should therefore be decided by the same court. A threshold issue in the consideration of each of these claims will be the level of protection to which plaintiffs are entitled as First Amendment speakers and, correspondingly, the amount of scrutiny to which the entire statutory scheme should be subject. In the interest of judicial economy, one court should

consider these issues simultaneously. Separation of plaintiffs' claims would also frustrate implementation of the statutory scheme by delaying a final determination of the Act's constitutionality. To avoid duplicative proceedings and preserve judicial resources, this Court should exercise its discretion to hear all pendent federal constitutional claims raised in the complaint.

Accordingly, plaintiff requests that a Three-Judge Court be convened pursuant to 28 U.S.C. § 2284 to hear all counts of the complaint.

Respectfully Submitted,

Allan A. Tuttle
D.C. Bar No. 236976
Garret G. Rasmussen
D.C. Bar 239616
Kenneth L. Glazer
D.C. Bar 411695
G. Kendrick Macdowell
(D.C. Bar # pending)
Texas Bar #12759100

PATTON, BOGGS & BLOW
2550 M Street, N.W.
Washington, D.C. 20037
(202) 457-6000

Attorneys For The Plaintiffs
Discovery Communications Inc. and
The Learning Channel, Inc.

Copies to be sent to:

Jay B. Stephens, Esq.
United States Attorney
for the District of Columbia
555 4th Street, N.W.
Washington, D.C. 20001

The Honorable William P. Barr
Attorney General of the United States
United States Department of Justice
4100 Bond Building
1400 New York Avenue, N.W.
Washington, D.C. 20530

Daniel M. Armstrong, Esq.
Office of General Counsel
Federal Communications Commission
Room 602
1919 M Street, N.W.
Washington, D.C. 20554

Bruce D. Sokler, Esq.
MINZ, LEVIN, COTTEN, FERRIS,
GIOVSKY AND POPEO, P.C.
701 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

Brian Conboy, Esq.
WILLKIE FARR & GALLAGHER
Three Lafayette Centre
1155 21st Street, N.W.
Suite 600
Washington, D.C. 20036-3384

H. Bartow Farr, III, Esq.
KLEIN, FARR, SMITH & TARANTO
2550 M Street, N.W.
Suite 350
Washington, D.C. 20037

Mr. Louis F. Ryan
The Travel Channel, Inc.
2690 Cumberland Parkway
Suite 500
Atlanta, GA 30339

Ms. Mary Ann Zimmer
Arts & Entertainment Network
235 E. 45th Street
New York, NY 10017

Ms. Debbie Lee
Black Entertainment
Television, Inc.
1232 31st Street N.W.
Washington, D.C. 20007

Mr. Christopher Fager
E! Entertainment
Television, Inc.
5670 Wilshire Boulevard
Los Angeles, CA 90036

Ms. Jane Tollinger
Hearst/ABC-Viacom
Entertainment, Inc.
34-12 36th Street
Astoria, NY 11106

Mr. Bruce D. Collins
National Cable Satellite
Corporation
400 North Capitol St., N.W.
Washington, D.C. 20001

Mr. Neal S. Grabell
QVC Network, Inc.
1365 Enterprise Drive
West Chester, PA 19380

Mr. Louis A. Isakoff
International Family
Entertainmment, Inc.
1000 Centerville Turnpike
Virgimia Beach. VA 23463

Mr. Stephen A. Brenner
USA Networks
1230 Avenue of the Americas
New York, NY 10020

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ORDER GRANTING APPLICATION FOR
A THREE-JUDGE COURT

Plaintiffs having filed an application asking that the claims set forth in this action heard and decided by a three-judge court, upon consideration of the application, it is this ___ day of November, 1992.

ORDERED that the motion be GRANTED and that all proceedings in this action shall be heard by a three-judge court.

United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Discovery Communications, Inc., Plaintiff,	
v.	Civil Action No. ____
United States and Federal Communications Commission	

MOTION FOR PRELIMINARY INJUNCTION

Pursuant to Federal Rule of Civil Procedure 65, the Plaintiff Discovery Communications, Inc. hereby moves this court for an order preliminarily enjoining the defendants from enforcing or implementing in any way Sections 3, 4, 5, 9, and 19 of the Cable Television Consumer Protection and Competition Act of 1992. For the reasons set forth in the accompanying memorandum and supporting affidavits, this motion should be granted.

Allan A. Tuttle
D.C. Bar No. 236976
Garret G. Rasmussen
D.C. Bar No. 239616
Kenneth L. Glazer
D.C. Bar No. 411695
G. Kendrick MacDowell
(D.C. Bar No. Pending)
Texas Bar No. 12759100

PATTON, BOGGS & BLOW
2550 M Street, N.W.
Washington, D.C. 20037
(202) 457-6000

Attorneys for Discovery Communications, Inc.

Dated: November 12, 1992

Copies to be sent to:

Jay B. Stephens, Esq.
United States Attorney
for the District of Columbia
555 4th Street, N.W.
Washington, D.C. 20001

The Honorable William P. Barr
Attorney General of the United States
United States Department of Justice
4100 Bond Building
1400 New York Avenue, N.W.
Washington, D.C. 20530

Daniel M. Armstrong, Esq.
Office of General Counsel
Federal Communications Commission
Room 602
1919 M Street, N.W.
Washington, D.C. 20554

Bruce D. Sokler, Esq.
MINZ, LEVIN, COTTEN, FERRIS,
GIOVSKY AND POPEO, P.C.
701 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

Brian Conboy, Esq.
WILLKIE FARR & GALLAGHER
Three Lafayette Centre
1155 21st Street, N.W.
Suite 600
Washington, D.C. 20036-3384

H. Bartow Farr, III, Esq.
KLEIN, FARR, SMITH & TARANTO
2550 M Street, N.W.
Suite 350
Washington, D.C. 20037

Mr. Louis F. Ryan
The Travel Channel, Inc.
2690 Cumberland Parkway
Suite 500
Atlanta, GA 30339

Ms. Mary Ann Zimmer
Arts & Entertainment Network
235 E. 45th Street
New York, NY 10017

Ms. Debbie Lee
Black Entertainment
Television, Inc.
1232 31st Street N.W.
Washington, D.C. 20007

Mr. Christopher Fager
E! Entertainment
Television, Inc.
5670 Wilshire Boulevard
Los Angeles, CA 90036

Ms. Jane Tollinger
Hearst/ABC-Viacom
Entertainment, Inc.
34-12 36th Street
Astoria, NY 11106

Mr. Bruce D. Collins
National Cable Satellite
Corporation
400 North Capitol St., N.W.
Washington, D.C. 20001

Mr. Neal S. Grabell
QVC Network, Inc.
1365 Enterprise Drive
West Chester, PA 19380

Mr. Louis A. Isakoff
International Family
Entertainmment, Inc.
1000 Centerville Turnpike
Virgimia Beach. VA 23463

Mr. Stephen A. Brenner
USA Networks
1230 Avenue of the Americas
New York, NY 10020

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ORDER

Upon consideration of plaintiff's Motion for a Preliminary Injunction, pursuant to fed. R. Civ. P. 65; and

The Court having reviewed the submissions of the parties and heard the arguments of counsel;

Now, on this _____ day of _____ 1992, for good cause shown, it is hereby

ORDERED that plaintiff's Motion for a Preliminary Injunction is GRANTED and defendants Federal Communications Commission and the United States of America are preliminarily enjoined from enforcing or implementing in any fashion Sections 3, 4, 5, 9, and

19 of the Cable Television Consumer Protection and Competition Act of 1992.

_____

United States District Judge

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Allan A. Tuttle
D.C. Bar No. 236976
Garret G. Rasmussen
D.C. Bar No. 239616
Kenneth L. Glazer
D.C. Bar No. 411695
G. Kendrick Macdowell
(D.C. Bar # pending)
Texas Bar #12759100

PATTON, BOGGS & BLOW
2550 M Street, N.W.
Washington, D.C. 20037
(202) 457-6000

Attorneys For The Plaintiffs
Discovery Communications, Inc. and
The Learning Channel, Inc.

TABLE OF CONTENTS

TABLE OF AUTHORITIES